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Supreme Court of the United States

October Term 1929

No. 50

T. L. CARPENTER AND LILLIE V. CARPENTER, PETITIONERS,

vs.

A. S. J. SHAW, AS STATE AUDITOR OF THE STATE OF OKLAHOMA, RESPONDENT.

BRIEF OF RESPONDENT.

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BRIEF OF RESPONDENT.

STATEMENT.

This action was instituted in the District Court of Oklahoma County against the respondent as State Auditor of the State of Oklahoma to recover gross production tax that had been paid by petitioners and assignors of petitioners on production of oil from land situated in Carter County, Oklahoma.

Petitioners alleged that T. L. Carpenter is enrolled as an intermarried Choctaw Indian, and that Lillie V, Carpenter is enrolled as a Choctaw Indian of one-sixteenth blood, and that petitioners owned allotments in Carter County, Oklahoma, from which oil was produced during

the calendar year 1926 and the first quarter annual period ending March 31st, 1927; that the assignor of petitioners, Mattie L. V. Zachary, was enrolled as a Choctaw Indian of one-sixty-fourth blood and had an allotment in Carter County, Oklahoma, and that Julia A. Morris, the other assignor of petitioners, was enrolled as a one-thirty-second Choctaw Indian and had an allotment as such in Carter County, Oklahoma.

Petitioners alleged that they and their assignors executed oil and gas leases on such allotments and that as to each of them they were still the owners of such allotments, and that twenty-one years from date of patent had not, when the suits were filed, expired. That during the calendar year 1926 and the first quarter annual period ending March 31st, 1927, oil was produced under said leases and that they paid to the state a gross production tax equal to 3 per cent of the value of the one-eighth royalty interest reserved to them as and when said oil was produced.

Petitioners further alleged that they paid the gross production taxes in the amounts assessed by the State under protest on April 30, 1927, not only for the quarter annual period ending on March 31, 1927, but for all four quarter annual periods during the calendar year 1926, and instituted this suit to recover said tax.

The petition contained no allegation by petitioners

that they were incompetent restricted Indians nor that the oil was produced under a departmental lease. In fact it is admitted that petitioners and their assignors were all unrestricted Indians with full power to encumber or convey their land as well as to lease the same for oil and gas purposes.

To the petition filed in the local court respondent filed a demurrer setting up the fact that as to the taxes due for the year 1926 the same were not paid when due and at the time required by law, but were delinquent when paid and that the facts pleaded did not constitute a cause of action in favor of petitioners and against the respondent. This demurrer was sustainerd by the trial court and upon appeal to the Supreme Court of the State of Oklahoma the judgment of the trial court was affirmed.

The opinion of the Supreme Court of the State of Oklahoma, the same being the court of last resort in the State of Oklahoma, is reported in 272 Pac. at page 393.

After a denial of a petition for rehearing a writ of certiorari was allowed on the 15th day of April, 1929. The complete opinion of the Supreme Court of the State of Oklahoma is found in the Stipulated Transcript Record at pages 29 to 50, both inclusive.

ARGUMENT AND BRIEF.

In this brief on behalf of respondent we will confine ourselves to a consideration of the following questions of law raised by petitioners in the order named:

I.

As to payment of taxes for the calendar year 1926, petitioners cannot recover because they did not comply with the local law as to payments and suits for recovery thereof.

II.

The oil here sought to be taxed is not exempt from state taxation by any act of Congress or Indian treaty, and when severed from the soil in which it is embedded becomes personal property, subject to taxation.

III.

The exaction of the tax in question does not deny petitioners the equal protection of the law under the Fourteenth Amendment.

In considering the above principles of law we will discuss the cases relied upon by petitioners, which they claim are opposed to the principles above set forth.

I.

As to payment of taxes for the calendar year 1926, petitioners cannot recover because they did not comply with the local law as to payments and suits for recovery thereof.

The tax sought to be imposed by the State of Oklahoma in the instant case is levied by Section 9814, Compiled Oklahoma Statutes 1921, which is quoted in full in petitioners' brief on page 26 thereof.

Said statute requires that the tax levied shall be paid "within thirty days after the expiration of the quarter annual period ending on the last day of March, A. D. 1916, and of each quarter annual period thereof expiring respectively on the last day of June, September, December and March of each year."

By Section 9815, Compiled Oklahoma Statutes 1921, the tax provided for becomes delinquent after the date fixed for each quarter annual payment.

In order therefore for petitioners to have paid the taxes for the calendar year 1926 at the time required by law such payment must have been made April 30th, 1926, July 30th, 1926, October 30th, 1926, and January 30th, 1927.

Petitioners' right to recover the taxes under local law arises under Section 9971, Compiled Oklahoma Statutes 1921, which is quoted in full on page 29 of petitioners' brief.

The established rule under many decisions of the Supreme Court of Oklahoma is that unless taxes are paid at the time and in the manner provided by law

they may not be recovered under Section 9971, Compiled Oklahoma Statutes 1921.

St. Louis & San Francisco Ry. Co. v. *Hendrickson, County Treasurer,* 127 Okla. 242, 260 Pac. 476.

St. Louis & San Francisco Ry. Co. v. *Hendrickson, County Treasurer,* 128 Okla. 266, 263 Pac. 148.

Oklahoma News Company v. *Ryan,* 101 Okla. 151, 224 Pac. 969.

National Bank of Muskogee v. *Pitts,* 120 Okla. 8, 249 Pac. 907.

State ex rel. Mothersead v. *Bennett,* 114 Okla. 76, 243 Pac. 726.

The Supreme Court of Oklahoma following said above decisions held therefore that petitioners were not entitled to recover the gross production taxes due from petitioners for the calendar year ending December 31st, 1926, for the reason that such taxes were not paid until April 30, 1927.

Petitioners seek to avoid the rule laid down by the Supreme Court by applying the decision of this Court in *Ward* v. *Board of County Commissioners of Love County,* 253 U. S. 17, 64 L. ed. 751.

The only question presented by said case is as to whether the payment of taxes was voluntarily made or was made under protest by the Indians in question, and the court held from the facts in the case that the taxes were not voluntarily paid and could be recovered. We

believe it is established by the case of *McCoy* v. *Shaw*, 277 U. S. 302, 72 L. ed. 891, that before petitioners can recover the taxes in question they must comply with the local law with reference to recovery thereof. There petitioner McCoy sought to enjoin the collection of the gross production tax levied by the State of Oklahoma upon his one-eighth royalty interest in oil produced from his homestead and surface allotments from which restrictions on alienation had been removed. The Supreme Court of Oklahoma held that an adequate remedy at law existed under Section 9971, Compiled Oklahoma Statutes 1921, the statute under which petitioners in this case are proceeding. This Court held that the decision of the State court was based upon non-federal grounds broad enough to sustain the decision and therefore dismissed the writ of certiorari for want of jurisdiction.

II.

The oil here sought to be taxed is not exempt from state taxation by any act of Congress or Indian treaty, and when severed from the soil in which it is embedded becomes personal property, subject to taxation.

To determine whether or not petitioners' property is exempt from taxation under any act of Congress or Indian treaty it is necessary to consider briefly the acts of Congress relating to petitioners' land.

By the Act of Congress of June 28th, 1898, 30 Stats. 495, commonly known as the Atoka Agreement relating

to the Choctaw-Chickasaw Nations, a separate allotment for each of said Indians was provided for with this further provision:

> "All allotted land shall be non-taxable so long as title remains in the original allottee, not exceeding however twenty-one years from the date of patent."

It is by virtue of this exemption of the allotted land of these petitioners that they contend that the oil produced therefrom is exempt from taxation.

In arriving at the true meaning and extent of such exemption "subsequent congressional legislation may be considered as an aid to the interpretation of prior legislation upon the same subject."

> *Tiger* v. *Western Investment Company et al.*, 221 U. S. 286, 55 L. ed. 738.

Subsequent to the enactment of the act of Congress above mentioned the Act of May 27th, 1908, 35 Stats. 312, was enacted by which it was provided in part that:

> "From and after sixty days from the date of this act the status of the lands allotted heretofore or hereinafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or encumbrances, be as follows: 'All lands including homesteads of said allottees enrolled as intermarried whites, as freedmen, and as mixed blood Indians having less than one-half Indian blood, including minors, shall be free from all restrictions.' * * * that all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property

of other persons than allottees of the Five Civilized Tribes."

The above quoted provision of the Act of May 27th, 1908, applies to the petitioners in this case who are less than one-half Indian blood, and by said act all restrictions against alienation as to the petitioners and their assignors were removed, and after the passage thereof the same might be either sold or leased by petitioners without any governmental supervision. It will be noted that it was plainly provided by Congress that the land of these petitioners, as to which restrictions upon alienation were removed, should be subject to taxation by the State the same as the land of white persons. However, in *Choate* v. *Trapp*, 224 U. S. 665, this Court held that the provision of the Act of Congress of May 27, 1908, making said unrestricted lands subject to taxation violated the vested right of such Indians to exemption from said taxation which was protected by the Fifth Amendment to the Constitution of the United States. In the opinion the Court said:

"The provision 'that all lands shall be non-taxable' naturally indicates that the exemption is attached to the land, * * * only an artificial rule can make it a personal privilege."

By said decision therefore it was established that these petitioners were entitled to non-taxable land so long as they held the title to their allotments, not exceeding twenty-one years from date of patent, but the cases

dealt solely with the right of the State to Tax the Indians' *land* and did not deal with his oil produced therefrom which became personal property upon production.

Although the provision of the Act of Congress of May 27th, 1908, specifically making the land of less than one-half blood Indians subject to taxation, was ineffective for that purpose it nevertheless shows an intention of Congress to make such land taxable if possible and negatives any idea of Congress to continue the exemption from taxation after the removal of restrictions.

We think this act may be considered by the Court in determining the meaning of the exemption originally granted these petitioners by Congress, and though unable to give effect to the full provision making the land taxable, we believe the exemption granted should not be extended beyond its exact terms and should be held to apply to his land only and not to oil produced from his land.

The further intention of Congress to require these Indians to bear their burden of supporting the State of Oklahoma is evidenced by the Act of May 10, 1928, Section 3, Ch. 517, Acts Seventieth Congress, Session I, at page 496, being as follows:

> "That all minerals, including oil and gas, produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, or from inherited restricted lands of full

blood Indian heirs or devisees of such lands, shall be subject to all state and federal taxes of every kind and character the same as those produced from lands owned by other citizens of the State of Oklahoma; and the Secretary of the Interior is hereby authorized and directed to cause to be paid, from the Individual Indian funds under his supervision and control and belonging to the Indian owners of the lands, the tax or taxes so assessed against the royalty interest of the respective Indian owners in such oil, gas and other mineral production."

That this has also been the trend of the recent decisions of the Supreme Court of the United States is indicated by the case of *Shaw* v. *Gibson-Zahnisher Oil Corp. et al.*, 276 U. S. 575, 72 L. ed. 709, wherein Mr. Justice Stone uses the following language (pages 713-714):

"The early legislation affecting the Indians had as its immediate object the closest control by the government of their lives and property. The first and principal need then was that they should be shielded alike from their own improvidence and the spoliation of others, *but the ultimate purpose was to give them the more independent and responsible status of citizens and property owners.* The present statute which enabled Miller Tiger to become the owner of the lands leased to the plaintiff is typical of the latter course of Indian legislation, which discloses a purpose to accomplish that end not only by the gradual relinquishment of restrictions upon the lands originally allotted to the Indians, but by encouraging their acquisition of other property and gradually enlarging their control over it until independence should be achieved. See *McCurdy* v. *United States*, *supra*, * * *.

"*In this, as in other Indian legislation, opportunity is afforded for their emancipation by imposing upon*

them duties as well as giving them the privileges of citizens and property owners, including the duty to pay taxes.''

Furthermore, the well known rule as stated in Cooley on Taxation, page 146, is that:

> ''The intention to exempt must in any case be expressed in clear and unambiguous terms.''

In *Llewellyn* v. *Colonial Trust Company,* 72 L. ed. 19, Mr. Justice Stone said:

> ''Tax exemptions are never lightly to be inferred'' (citing cases).

In *Goudy* v. *Meith,* 203 U. S. 146, 51 L. ed. 130, the court, in considering the question as to whether the land owned by an Indian was exempt from taxation, said:

> ''His property, unless exempt, became subject to taxation in the same manner as property belonging to other citizens, and the rule of exemptions for him must be the same as for other citizens—that is, that no exemption exists by implication, but must be clearly manifested.''

The contention of respondent in this case is that Congress, by the Atoka Agreement above mentioned, attempted to exempt from taxation only the land of petitioners and that, since exemptions by implication do not exist, and that since Congress has evidenced a desire even to tax the land of this petitioner, that said tax exemption should not extend to their oil produced from said land, which the State seeks to tax in this case, because when

served from the land such oil becomes personal property not covered by said tax exemption.

In the early case of *Forbes* v. *Gracey*, 94 U. S. 762, an action was brought to enjoin the collection of the Nevada gross production tax. The tax, by the State statute of Nevada, was imposed upon the proceeds of the mine worked by a corporation, and the tax was resisted on the ground that the title to the land from which the mineral was taken was in the United States, and was not for that reason liable to state taxation. The court held that the State had power to impose the tax in question upon the mineral taken from the land, the title to which was in the United States, and that the moment the ore became detached from the soil in which it was embedded it became personal property, subject to taxation, although the land from which it was taken was not taxable. From the opinion the following language is taken:

"It is very true that Congress has, by statutes and by tacit consent, permitted individuals and corporations to dig out and convert to their own use the ores containing the precious metals which are found in the lands belonging to the government, without exacting or receiving any compensation for those ores, and without requiring the miner to buy or pay for the land. It has gone further, and recognized the possessory rights of these miners, as ascertained among themselves by the rules which have become the laws of the mining districts as regards mining claims. See Revised Statutes, Title XXXII, Chap. 6, Sections 2318-2352. But in doing this it has not

parted with the title to the land, except in cases where the land has been sold in accordance with the provisions of the law on that subject. If the tax of the State of Nevada is, in point of fact, levied on this property right of the United States, we are bound by our previous decisions and by sound principle to hold that it is void. If, on the other hand, it is levied on property of the miner, and may be collected without affecting or embarrassing the title of the United States to property which belongs to that government, then there is no ground for interference with the processes of the State in its collection. A few extracts from the statute of Nevada, showing the nature and character of the property on which the contested tax is imposed, and the manner of its enforcement and collection, will enable us to decide whether it belongs to the one or the other of these classes. We copy here the important sections of the Act of February 28, 1871, imposing this tax: [here the court quotes the statutes] * * *.

"As we construe the statutes of the United States and the recognized rule of the government on this subject, the moment this ore becomes detached from the soil in which it is embedded it becomes personal property, the ownership of which is in the man whose labor, capital and skill has discovered and developed the mine and extracted the ore or other mineral product. It is then free from any lien, claim, or title of the United States, and is rightfully subject to taxation by the State as any other personal property is.

"The truth of this proposition is too obvious to need or admit of illustration or elaboration, and, as we have already said, the pressure of business does not admit of it.

"In regard to the taxing of this personal property, and the mode of collecting it by sale as provided in the section last cited, it does not seem to us that

there can be any ground for asserting that the United States has any interest in the tax or in the sale of the property taxed."

In the Gracey case, *supra,* the government owned the land from which the ores were produced. That land owned by the United States and lying within the State is not taxable by the State has been long established; *Van Brocklin* v. *Tennessee,* 117 U. S. 151. The land from which the ores in the Gracey case were produced was as evidently free from State taxations as is petitioners' land exempted from State taxation by the Atoka Agreement above referred to. This Court, however, regardless of the fact that lands belonging to the United States are non-taxable by the State, held that when the minerals were produced they became personal property and subject to taxation. The minerals in that case were in the same position that petitioners' oil in the instant case occupies, and this Court sustained the State's tax in the Gracey case, regardless of the exemption of the land from taxation. Petitioners say that the Gracey case, *supra,* is not analogous to the instant case, in that in said case the government did not own the minerals, whereas in this case petitioners do own the oil sought to be taxed. This does not appear to be a distinguishing principle, however, because the proposition of law established by the Gracey case, *supra,* is that even though the land from which minerals are produced is exempt from taxation, the minerals so produced becoming personal property, are not entitled to such exemption. Since *Choate* v. *Trapp, supra,* holds that petitioners' tax exemption attaches to the land itself and is not a personal

privilege it is immaterial that petitioners own the oil here sought to be taxed.

We believe the court was clearly right in the Gracey case, *supra,* in holding that minerals when severed from the land became personal property and subject to taxation. In fact, we think it cannot be urged that oil when severed from the land is not personal property.

In *Elders* v. *Wood,* 208 U. S. 226, the Gross Production Law of the State of Colorado was sustained and the tax held to be valid. In said case it was contended that the gross production tax upon the mining claims and products from the mines granted by the United States was invalid for the reason that the operation of such mines was a Federal agency, which the State had no right to tax. The opinion of the court was delivered by Mr. Justice Moody, holding that the property value of the claims and the products obtained from the mines were property belonging to the operator of the mines, the court saying:

> "Such an interest from early times has been held to be property distinct from the land itself, vendable, inheritable and taxable."

In *Belk* v. *Meager,* 104 U. S. 283, it was held:

> "A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed, and will pass by descent" (citing *Forbes* v. *Gracey, supra*).

See, also:

> *Manuel* v. *Wulff,* 152 U. S. 505.
> *St. Louis Mining & Milling Company* v. *Montana Mining Company,* 171 U. S. 650.

In *Kelly* v. *Ohio Oil Co.,* 39 L. R. A. 765, the Supreme Court of Ohio was required to determine the rights of

adjoining land owners to take oil from the land and the right of one landowner by drilling wells to draw oil from beneath the land of adjoining land owners. An injunction was sought to prevent an adjoining land owner from offsetting plaintiff's land and extracting oil from the land of plaintiff. In the opinion the court sad:

> "*Petroleum oil is a mineral, and while in the earth it is a part of the realty, and, should it move from place to place by percolation or otherwise, it forms part of that tract of land in which it tarries for the time being, and, if it moves to the next adjoining tract,* IT BECOMES part and parcel of that tract; and it forms part of some tract until it reaches a well, and is raised to the surface, and then for the first time it becomes the subject of distinct ownership, separate from the realty, *and becomes personal property*—the property of the person in whose well it came. And this is so whether the oil moves, percolates, or exists in pools or deposits. In either event, it is the property of, and belongs to, the person who reaches it by means of a well, and severs it from the realty, and converts it into personalty. * * *."

In *Nonamaker* v. *Amos*, 76 N. E. 949, 4 L. R. A. (N. S.) 980, the Supreme Court of Ohio had before it the question as to whether or not a change of the consideration for an oil lease was a contract in regard to land or an interest in land, and therefore prohibited by the statute of fraud by parol agreement. In the opinion it is said:

> "The title to the land is not involved, nor is any interest or estate therein. The question arises on a lease supplemented by a parol contract with reference to the consideration. There is no controversy over the extent of the grant, and the parol contract does not undertake to lessen or enlarge the estate

granted. Touching the division of the oil when brought to the surface, the written lease stipulates that the lessees shall yield and pay 'to the lessor the one-sixth part of the oil produced and saved from the premises, delivered free of expense into the tanks or pipeline to the lessor's credit * * *.' This share is the lessor's compensation for the lease and the rights granted therein. The five-sixths go to lessees by virtue of the same instrument, because the grant to them was the oil contained in the premises. Therefore the parol contract related to personal property, and not real estate, or an interest in or concerning the same. In *Kelly* v. *Ohio Oil Co.*, 57 Ohio St. 317, 39 L. R. A. 765, 63 Am. St. Rep. 721, 49 N. E. 399, this court held that petroleum oil is a mineral, and while it is in the earth it forms part of the realty; and, when it reaches a well and is produced on the surface, it becomes personal property, and belongs to the owner of the well. In the opinion by Burket, J. (on page 328 of 57 Ohio St., page 768 of 39 L. R. A., page 722 of 63 Am. St. Rep., and page 401 of 49 N. E.), it is said: 'Petroleum oil is a mineral, and while in the earth it is part of the realty, and should it move from place to place by percolation, or otherwise, it forms part of that tract of land in which it tarries for the time being, and, if it moves to the next adjoining tract, it becomes part and parcel of that tract; and it forms part of some tract until it reaches a well and is raised to the surface, and then for the first time it becomes the subject of distinct ownership separate from the realty, and becomes personal property, the property of the person into whose well it came. * * * It is property of, and belongs to, the person who reached it by means of a well and severs it from the realty and converts it into personalty.' The same doctrine is again laid down in *Northwestern Ohio Natural Gas Co.* v. *Ullery*, 68 Ohio St. 259, 67 N. E. 494.

"The lessees, by the written instrument, agreed to

drill and operate for oil, and of what they would thus produce from the wells, and thereby sever from the realty, they were to yield and pay to the lessor 'one-sixth.' Hence, when the parties entered into the parol contract as found by the lower court, they were not contracting for an interest in or concerning real estate, but for a division of personal property in proportions different from those named in the written lease. * * *."

In *Kelly* v. *Keys*, 62 Atl. 911, the Supreme Court of Pennsylvania held that the lessee in an oil lease did not have such an interest in land as entitled him to maintain ejectment. In the opinion the Court said:

"In no case is it held that the grant of an exclusive right to mine for and produce oil, though it be a mineral, is a sale of the oil that may afterward be discovered. When under such a grant oil has been discovered, it is the grantee's right to produce it and sever it from the soil. So much as thus severed belongs to the parties entitled under the terms of the grant, not as any part of the real estate, however, but as a chattel, and only so much as is produced and severed passes under the grant. * * * The reason for the rule thus established is to be found in the peculiar character of mineral oil. This is very clearly indicated in the earlier cases, where the distinction is drawn between minerals which are fugacious in their nature, such as water, gas and oil, and those which have a fixed *situs* and are necessarily part of the land; and this distinction has been allowed with controlling significance whenever oil *in situ* has been the subject of the dispute. Both rule and reason are against the theory that prevailed with the court below, to the effect that, the mineral once discovered, all that was *in situ* became in law part of the real estate.

"With the rights of the appellee thus defined and limited by the cases cited above, it is manifest, without discussion, that he is in no position to maintain ejectment for the property."

We believe that the above authorities definitely establish the proposition that oil, when severed from the land, becomes and is personal property and that, therefore, since only petitioners' land is exempt from taxation, such exemption should not be extended to their personal property.

CASES RELIED UPON BY PETITIONERS.

In their brief petitioners call the Court's attention to the case of *Barnes* v. *Keys,* 127 Pac. 261, the syllabus of which is as follows:

"Where the owners of a life estate and the owners of the remainder join in an oil and mining lease, and the lessee develops the lease and produces oil, the life tenants are entitled either to have the royalties invested and to receive the income therefrom, or to receive such a proportion of the royalty as will amount to the present value of an annuity for the life expectancy of the life tenant equal to the interest on the royalties at 6 per cent."

In the opinion, the Court said:

"As was held in *Stoughton's Appeal,* 88 Pa. 201, and other cases in same line, oil in place is a mineral, and, being a mineral, it is part of the realty."

With this proposition defendant agrees, because it is admitted by all that oil, until severed, is part of the

land, but that does not affect the proposition that oil, when severed, is personal property.

Petitioners also cite *State* v. *Snyder*, 212 Pac. 758, the fourth paragraph of the syllabus of which is as follows:

> "Under act of admission, Section 4, granting school lands to the state, but by Section 13 excluding mineral lands, and Section 5 requiring disposition by public sale, the proceeds to constitute a permanent school fund, the interest of which only shall be expended for maintenance, but permitting five-year leases, and under Const. Art. 7, Section 2, declaring proceeds from such sales or leases to be a perpetual fund, and Const. Art. 7, Section 7, restricting application of rents from unsold lands to the support of free schools, *Held*, that rents and royalties derived from oil leases are not the ordinary rents contemplated by Const. Art. 7, Sec. 7, but arise from and represents the corpus of the land, and must be treated as principal becoming part of the permanent school fund, and Laws 1921, c. 66, and Laws 1921, c. 147, amending Compiled Statutes 1920, Section 144, are unconstitutional insofar as authorizing diversion of oil rents and royalties from the permanent fund."

It will be noted that in said case the question was whether rents and royalties derived from oil leases from the school lands of Wyoming should be paid into the permanent school fund or whether such rents and royalties might be used in the support of said school. It will be noted that the constitutional provision under consideration in said case provided that *proceeds* from the sale of school land should constitute a permanent school fund.

It is evident, therefore, that the decision in that case holding that the rents and royalties should go to the permanent school fund was correct, because they were certainly proceeds from school lands. If, in the instant case, the act of Congress exempted the land of the Indian and the proceeds from his land, the case would be in point here, but under the act of Congress above quoted the exemption runs to the land alone and not to the proceeds from the land. We believe, therefore, that the Snyder case is distinguishable in principle from the case at bar.

Petitioners also rely upon the case of *State ex rel.* v. *Hatcher*, 281 S. W. 192, in which case the Supreme Court of Texas dealt with the same question as that dealt with by the Supreme Court of Wyoming in the Snyder case, *supra*, and in which case the Supreme Court of Texas quotes with approval from the Snyder case. The first paragraph of the syllabus is as follows:

"Oil is part of 'land', and can be sold in place."

The question before the court was as to whether or not under the constitutional provision providing that the proceeds from the sale of school land should go to the permanent school fund of the State of Texas controlled as to rents and royalties derived from oil leases on such school land. The court declared unconstitutional the statute which permitted the use of said money for the con-

struction of buildings for the University of Texas. An examination of that case discloses that the constitutional provision of Texas was practically the same as that of Wyoming, in that it also required that the *proceeds* from the sale of school land should go to the permanent school fund. The court held that such rents and royalties were proceeds from school land and should go to the permanent school fund. From the opinion the following language is taken:

> *"If it should be contended that oil, when severed from the land, becomes personalty, that fact is immaterial and would not change the status of such property. It is provided in our Constitution that the 'proceeds' of the land which is gone shall become part of the permanent fund. In other words, not only the realty, but the resulting personalty, is a part of that fund. Of course, proceeds arising from an alienation or taking of land, or any portion thereof, is usually money or personalty. It was the intention of the framers of our fundamental law that this land, and each portion thereof, should always be in the permanent fund. It was foreseen that it might be best to sell it. In that event it was expressly provided that the substitute for the land should take its place in the permanent fund."*

Said quoted portion of the opinion of the court fully sustains the contention of the defendant, that oil, when severed from the land, becomes personalty, and that such fact was immaterial in both the Texas case and the Wyoming case because of the fact that in each case the constitution required even the proceeds from the land to go

to the permanent school fund, and it is clear that oil and gas royalties are proceeds from the land.

Petitioners also rely upon the case of *Pollock* v. *Farmers Loan & Trust Company,* 157 U. S. 429. In the Pollock case, in an opinion two hundred and twenty-four pages long, the court had before it the validity of an Act of Congress levying an income tax on certain property not according to the rule of apportionment as required by the Constitution. In the opinion, at page 558, the court said:

> "The first question to be considered is whether a tax on the rental or income of real estate is a direct tax within the meaning of the constitution."

The constitutional provision referred to provides that representatives and direct taxes shall be apportioned among the several states according to numbers, and that no direct tax shall be laid except according to the enumeration provided for. On pages 579 to 581 the court said:

> "As no capitation, or other direct tax was to be laid otherwise than in proportion to the population, some other direct tax than a capitation tax (and it might well enough be argued some other tax of the same kind as capitation tax) must be referred to, and it has always been considered that a tax upon real estate *eo nomine* or upon its owners in respect thereof is a direct tax within the meaning of the Constitution. But is there any distinction between the real estate itself or its owners in respect of it and the rents or income of the real estate coming to the owners as the natural and ordinary incident of their own-

ership? * * * The requirement of the Constitution is that no direct tax shall be laid otherwise than by apportionment—the prohibition is not against direct taxes on land, from which the implication is sought to be drawn that indirect taxes on land would be constitutional, but it is against all direct taxes—and it is admitted that a tax on real estate is a direct tax. Unless, therefore, a tax upon rents or income issuing out of lands is intrinsically so different from a tax on the land itself that it belongs to a wholly different class of taxes, such taxes must be regarded as falling within the same category as a tax on real estate *eo nomine*. The name of the tax is unimportant. The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on real estate, which would be paid out of the rent or income. This law taxes the income received from land and the growth or produce of the land. Mr. Justice Paterson observed in Hylton's case, 'land independently of its produce, is of no value'; and certainly had no thought that direct taxes were confined to unproductive land."

Therefore, it is evident that the Pollock case decided the question only that a tax on rents and income from land was a direct tax requiring apportionment among the states the same as a tax upon the land itself. In referring to the question as to whether real estate belongs to one of the two great classes of taxes, and rent and income to the other, the court had in mind the two classes of direct and indirect taxation, and held that an income tax on

rent from land not apportioned as required by the Constitution among the states was invalid because it was a direct tax. That this is the proper construction of the holding in the Pollock case is evidenced by the case of *Evans* v. *Gore,* 64 L. ed. 887, 253 U. S. 244, where the question involved was as to whether or not the Federal government could levy an income tax on the salary of a Federal judge, and it was held that the Constitution of the United States prevented the diminishing of the emoluments of a Federal Judge during his term of office. In the opinion the court said:

> "Let us turn, then, to the circumstances in which this amendment was proposed and ratified, and to the controversy it was intended to settle. By the Constitution all direct taxes were required to be apportioned among the several states according to their population, as ascertained by a census or enumeration (Art. 1, Section 2, Cl. 3, and Section 9, Cl. 4), but no such requirement was imposed as to other taxes. And apart from capitation taxes, with which we now are not concerned, no rule was given for determining what taxes were direct and therefore to be apportioned, or what were indirect and not within the requirement. Controversy ensued and ultimately centered around the right classification of income from taxable real estate and from investments in taxable personal property. The matter then came before this court in *Pollock* v. *Farmers Loan & T. Co.,* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673, 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; and the decision, when announced, disclosed that the same differences in opinion existing elsewhere were shared by the members of the court—five, the controlling number, regarded a tax on such income as in

effect a direct tax on the property from which it arose, and therefore as requiring apportionment, and four regarding it as indirect and not to be apportioned. Much of the law then under consideration had been framed according to the latter view, and because of this and the adjudged inseparability of other portions the entire law was held invalid. Afterwards, to enable Congress to reach all taxable income more conveniently and effectively than would be possible as to much of it if an apportionment among the states were essential, the Sixteenth Amendment was proposed and ratified. *In other words, the purpose of the Amendment was to eliminate all occasion for such an apportionment because of the source from which the income came—a change in no wise affecting the power to tax, but only the mode of exercising it.*"

Petitioners contend that the gross production tax levied by the State of Oklahoma is a tax upon the royalty interest in the land and is not a tax upon the oil after it is produced. In answering this contention in this case the Supreme Court of Oklahoma in 272 Pac. at page 400 said:

"Thus it appears that the gross production tax is a property tax assessed upon producers of minerals as going concerns and based upon 3 per cent of the gross proceeds after and when the subject of the tax is produced. Likewise everything incident to the lessee's production is taxed on a basis of 3 per cent of the oil and gas produced and everything incident to the lessor's royalty rights in the production is assessed upon a 3 per cent basis of his share of the oil and gas so reduced to possession.

"We find no discrimination between the lessor and the lessee, for each is assessed in the same manner, and there is no denial to the one or to the other of

equal protection of the law and no violation of the Fourteenth Amendment to the Constitution of the United States."

The construction of the meaning of a State statute by the highest court of the State is binding upon the Supreme Court of the United States.

Brown-Formon Co. v. *Kentucky,* 217 U. S. 563.

III.

The exaction of the tax in question does not deny petitioners the equal protection of the law under the Fourteenth Amendment.

In connection with the contention of the petitioners that the exaction of the tax in question from them upon the royalty interest would deny them the equal protection of the law there is cited in the brief certain sections of the Constitution of Oklahoma which petitioners say are violated by the levying of this tax on petitioners' property. These contentions were made in the State court and that court held that none of the provisions of the State Constitution relied upon were violated by the tax, and of course it is not open to petitioners here to insist that provisions of the Oklahoma Constitution have been violated, the construction of the highest court of the State upon its own constitutional provisions being binding upon this Court.

Southwestern Oil Co. v. *Texas,* 217 U. S. 114.

In support of petitioners' contention that they are

denied the equal protection of the law under the Fourteenth Amendment to the Constitution of the United States, petitioners cite *Sioux City Bridge Company* v. *Dakota County,* 260 U. S. 441, 67 L. ed. 340, holding that to tax the property of one company at its full value and all the rest of the property in the county at only fifty-five one-hundredths of its value is a denial of the protection of the law. No other cases in support of petitioners' contention are cited.

We believe it is not apparent from the Oklahoma statutes that there is any discrimination in the valuation of the petitioners' property as compared with other property in the same class and similarly situated.

In *Kentucky Railway Tax Cases,* 115 U. S. 321, 29 L. ed. 414, the rule as to the equal protection required by the Fourteenth Amendment to the Constitution was stated as follows:

> "The rule of equality in respect to the subject only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and the other corporations in the methods and instrumentalities by which the value of their property is ascertained."

In *Delaware R. Co. Tax,* 18 Wall. 206, 231, 21 L. ed. 888, 896, it was said:

> "It is not for us to suggest in any case that a more

equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the state. Our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction."

To the same effect is:

Bell's Gap. R. Co. v. *Pennsylvania,* 134 U. S. 232.
Home Insurance Company v. *New York,* 134 U. S. 594.
Pacific Express Company v. *Seibert,* 142 U. S. 339.
Southwestern Oil Company v. *Texas,* 217 U. S. 114.

As held by the Supreme Court of the State in its decision in this case the statute of Oklahoma requires the payment of a gross production tax based upon 3 per cent of the gross proceeds of oil produced after and when the same is produced and the 3 per cent is used as a basis in arriving at the value of the property so taxed, and this applies not only to lessee's interest but also to the lessor's royalty interest in the production, and we believe the means adopted clearly applies to both lessor and lessee.

This was the holding of the State Supreme Court in prior decisions such as:

In re Gross Production Tax of Wolverine Co., 53 Okla. 24, 154 Pac. 362.
Protest of Bendalari, 82 Okla. 97, 198 Pac. 606.
In re Skelton Lead & Zinc Company's Gross Production Tax, 81 Okla. 134, 197 Pac. 495.

We believe, therefore, that there is no denial of the

equal protection of the laws within the meaning of the Fourteenth Amendment of the Constitution in exacting the tax in question from petitioners.

We therefore respectfully submit that the decision of the Supreme Court of the State of Oklahoma should be in all things affirmed.

Respectfully submitted,

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